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No.

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

SOONDAR MAHADEO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTION PRESENTED

Whether the district court could exercise habeas corpus jurisdiction under 28 U.S.C 2241 to entertain respondent's challenge to his final removal order.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are Janet Reno, the Attorney General of the United States, Mary Ann Wyrsch, the Acting Commissioner of Immigration and Naturalization, and Steve Farquharson, the District Director of the Immigration and Naturalization Service. Respondent (plaintiff-appellant below) is Soondar Mahadeo.

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In the Supreme Court of the United States

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JANET RENO, ATTORNEY GENERAL, ET AL.,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General, the Acting Commissioner of Immigration and Naturalization, and the District Director of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 226 F.3d 3. The opinion of the district court (App., *infra*, 25a-29a) is reported at 52 F. Supp. 2d 203. The decision of the Board of Immigration Appeals (App., *infra*, 30a-36a) and the order of the immigration judge (App., *infra*, 37a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App., *infra*, 40a-56a) are pertinent provisions of the Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276 (enacted Apr. 24, 1996); Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996); and Section 2241 of Title 28, United States Code.

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-

132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien who is convicted of an "aggravated felony," as defined in the INA, see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998), is subject to deportation. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and, if his conviction was for an aggravated felony, that he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[1] If the Attorney General denied relief from deportation, then the alien could challenge that denial of relief by filing a petition for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances, an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for

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[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, the Second Circuit held in *Francis* v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country must also be given the opportunity to apply for relief from deportation under Section 1182(c). The Attorney General acquiesced in that decision.

a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section—including aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a

(Supp. IV 1998); 110 Stat. 3009-587 to 3009-593. As before, an alien (including a legal permanent resident alien) convicted of an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998).

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. As under AEDPA, Congress provided that aliens convicted of aggravated felonies are ineligible for discretionary relief. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110

Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA, 110 Stat. 3009-607. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial-review provisions with the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Respondent is a native and citizen of Trinidad and Tobago who was admitted to the United States as a legal permanent resident in 1975. On December 14, 1984, before the enactment of AEDPA and IIRIRA, respondent was convicted in Massachusetts state court of possession of a controlled substance (marijuana) with intent to distribute it. App., *infra*, 2a. Under the INA, that offense constituted "illicit trafficking in a controlled substance," and was therefore an aggravated felony. See 8 U.S.C. 1101(a)(43)(B); App., *infra*, 2a.

On May 30, 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based on his drug trafficking offense. On November 13, 1997, an immigration judge found respondent deportable based on his conviction for an aggravated felony offense and ordered him removed to Trinidad and Tobago. App., *infra*, 3a, 37a-39a.

The Board of Immigration Appeals (BIA) affirmed. The BIA rejected respondent's contention that he should be permitted to apply for relief from deportation under old Section 1182(c), and that application of IIRIRA's repeal of that provision to his case would be impermissibly retroactive. App., *infra*, 31a-32a. The BIA noted that "[c]ongressional repeal of a discretionary power to relieve an alien from deportation does not attach any new legal consequences to pre-enactment convictions," and that, "[i]n any event, the presumption against retroactivity * * * does not exist in this case" because IIRIRA expressly eliminated relief under Section 1182(c) in removal proceedings commenced on or after April 1, 1997. *Id.* at 33a.

3. Respondent then filed a petition for a writ of habeas corpus in district court, seeking to invoke that

court's jurisdiction under 28 U.S.C. 2241. Respondent contended (among other things) that, notwithstanding the repeal of the former Section 1182(c) and the fact that he was placed in removal proceedings under the new provisions of IIRIRA, rather than in deportation proceedings under the pre-IIRIRA provisions of the INA, he remains eligible to be considered for discretionary relief under Section 1182(c), and that the repeal of that provision was not to be applied "retroactively" to his case, which involves a criminal conviction entered before IIRIRA took effect. The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). The district court agreed with the government that it lacked jurisdiction under Section 2241 and dismissed the habeas corpus petition. App., *infra*, 28a-29a.

4. The court of appeals reversed, and remanded for further proceedings. App., *infra*, 1a-24a. The court followed its prior holding in *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999), which had held, in a case arising under IIRIRA's transitional rules, that AEDPA and IIRIRA had not divested the district courts of their authority to review deportation orders by habeas corpus. See App., *infra*, 7a. The court also stated that, under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), respondent, as an alien removable because of an aggravated felony conviction, was precluded from raising his challenge to his final removal order by petition for review in the court of appeals. App., *infra*, 7a. Respondent's "only avenue for relief, therefore, was to petition for a writ of habeas corpus." *Ibid.*

The court of appeals agreed with the government that Section 1252(a)(2)(C) would not preclude the court from reviewing "jurisdictional facts" concerning the applicability of that preclusion of review to respondent—"i.e., whether [respondent] is an alien, removable, and removable because of a conviction for a qualifying crime." App., *infra*, 11a. The availability of such review on those "limited threshold issues" was of little moment to respondent's case, the court nonetheless stated, because "the crux of his petition is a challenge to the BIA's interpretation of IIRIRA as precluding discretionary relief, not a challenge to the applicability" of the preclusion of judicial review. *Id.* at 12a.

The court then concluded that Congress had not repealed the district courts' authority under 28 U.S.C. 2241 to hear legal challenges to removal orders by criminal aliens who are precluded from bringing those challenges directly in the court of appeals. App., *infra*, 13a-22a. In particular, the court rejected (*id.* at 15a-16a) the government's contention that district court review was precluded by 8 U.S.C. 1252(a)(1) (Supp. IV 1998)—which provides that "[j]udicial review" of removal orders may be had "only" in the court of appeals—and by 8 U.S.C. 1252(b)(9) (Supp. IV 1998)—which provides that "[j]udicial review of all questions of law and fact" arising from any removal proceeding shall be available "only" in judicial review under Section 1252 itself. Those provisions, the court reasoned, "speak only of 'judicial review,'" and "'[j]udicial review' and 'habeas corpus' have important and distinct technical meanings in the immigration context." App., *infra*, 15a (further internal quotation marks omitted). Thus, the court read "judicial review" in Section 1252 to mean only access to the court of

appeals by petition for review, and not access to the habeas corpus jurisdiction of the district courts under Section 2241. *Id.* at 16a.

The court also rejected the government's contention that review was precluded by Section 1252(a)(2)(C), which provides that, "[n]otwithstanding any other provision of law," no court shall have jurisdiction to review a final order of removal entered against an aggravated felon. That provision, the court stressed, contained no express reference to habeas corpus or to 28 U.S.C. 2241. The court accordingly held that Section 1252(a)(2)(C) merely restricts the courts of appeals from entertaining claims on petitions for review filed by aggravated felons, and does not "abrogate habeas jurisdiction." App., *infra*, 19a. Moreover, the court continued (*id.* at 21a), none of the provisions relied on by the government contain an "express reference" to jurisdiction under 28 U.S.C. 2241, which the court deemed necessary to divest the district court of authority to review of final orders of removal by habeas corpus, under this Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

"In short," the court stated, "IIRIRA's permanent rules * * * lack a clear statement of intent to repeal § 2241 jurisdiction." App., *infra*, 22a. The court therefore reversed the district court's dismissal of respondent's habeas corpus petition on jurisdictional grounds, and remanded for further proceedings on the merits of respondent's claim that he is eligible for discretionary relief from deportation under Section 1182(c) notwithstanding its repeal and resulting inapplicability in removal proceedings under the permanent provisions of IIRIRA. *Id.* at 23a-24a.

REASONS FOR GRANTING THE PETITION

The court of appeals concluded in this case that a criminal alien found removable in proceedings commenced under IIRIRA because of an aggravated felony conviction may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of his removal order. The courts of appeals have reached differing conclusions on the question whether the district courts retain such authority to review challenges to removal orders on habeas corpus. The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have concluded that Congress divested the district courts of such authority. By contrast, in addition to the First Circuit in the decision below (App., *infra*, 13a-22a), the Second, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over retroactivity challenge), petition for cert. pending, No. 00-767; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956, at *1-*2 (9th Cir. Nov. 17, 2000) (same); see also *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (same), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Flores-Miramontes* v. *INS*, 212 F.3d 1133,

1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the Immigration and Nationality Act, we have filed a petition for review in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[2] Our petition in *St. Cyr* also seeks review of the Second Circuit's decision on the merits of the alien's challenge to his removal order in that case, in the event that the Court concludes in *St. Cyr* that the district court properly took jurisdiction of the case under 28 U.S.C. 2241. Because the Second Circuit's decision on the merits in *St. Cyr* also warrants this Court's review, *St. Cyr* is in our view a better vehicle than this case for resolution of the jurisdictional question that is presented in both cases. Accordingly, we suggest that the Court hold this petition pending its disposition of *St. Cyr*.

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[2] We are providing respondent with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented by the petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, No. 00-523; *Rodriguez* v. *INS*, No. 00-753; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1687

SOONDAR MAHADEO, PETITIONER, APPELLANT

v.

JANET RENO, STEVE FARQUHARSON, AND DORIS MEISSNER, RESPONDENTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts
[HON. RICHARD G. STEARNS, U.S. DISTRICT JUDGE]

[Decided Sept. 11, 2000]

Before: SELYA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LIPEZ, Circuit Judge.

LIPEZ, *Circuit Judge.* This case requires us to decide whether the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), repeal the jurisdiction of the federal district courts pursuant to 28 U.S.C. § 2241 to review statutory

interpretation and constitutional claims asserted by aliens convicted of one or more crimes specified in the Immigration and Nationality Act ("INA") on a petition for a writ of habeas corpus. We have previously held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and IIRIRA's transition rules eliminated our jurisdiction to review on direct appeal a deportation order entered against an alien convicted of certain crimes, *see Goncalves* v. *Reno*, 144 F.3d 110, 117 (1st Cir. 1998) (construing IIRIRA transition rules); *Kolster* v. *INS*, 101 F.3d 785, 786 (1st Cir. 1996) (construing AEDPA), but that neither AEDPA nor IIRIRA's transition rules revoked the district courts' historical power pursuant to the general federal habeas corpus statute to review statutory or constitutional challenges to immigration decisions, *see Mattis* v. *Reno*, 212 F.3d 31, 35 n.6 (1st Cir. 2000); *Wallace* v. *Reno*, 194 F.3d 279, 285 (1st Cir. 1999); *Goncalves*, 144 F.3d at 113. We hold today that IIRIRA's permanent rules likewise do not divest the federal courts of their traditional jurisdiction to grant writs of habeas corpus pursuant to § 2241.

I.

A native of Trinidad and Tobago, Soondar Mahadeo immigrated to the United States with his family twenty-six years ago. In 1984, and again in 1991, Mahadeo was convicted of possession of marijuana with intent to distribute; each conviction constitutes an "aggravated felony" as defined by the INA. *See* INA § 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B).[1] On May 30,

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[1] An "aggravated felony" falls in the category of crimes that precludes judicial review under INA § 242(a)(2)(C), AEDPA § 440(a), IIRIRA transition rule § 309(c)(4)(G), and IIRIRA per-

1997, the INS commenced removal proceedings against Mahadeo. The immigration judge found him removable and ordered him deported.

Mahadeo appealed to the Board of Immigration Appeals ("BIA"), arguing that he was entitled to apply for a discretionary waiver of the removal order pursuant to former INA § 212(c), as it stood before it was amended by AEDPA and repealed by IIRIRA.[2] In particular, he argued that denying him access to former

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manent rule § 304(a), which adds new INA § 240A. We refer to the aliens whose convictions place them within this category, *see infra* note 4, variously as "criminal aliens," or "aliens with a criminal conviction."

[2] Before AEDPA amended § 212(c) in 1996, it provided in relevant part:

> Aliens lawfully admitted for permanent residence . . . who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Codified at 8 U.S.C. § 1182(c) (1995). The second sentence does not apply to Mahadeo because he did not serve five years for either of his felony convictions. Despite the literal language of § 212(c), which speaks only of aliens "returning," it had been construed to apply not only to aliens seeking discretionary relief from *exclusion*, but also to aliens, like Mahadeo, seeking discretionary relief from *deportation*. *See Joseph* v. *INS*, 909 F.2d 605, 606 n.1 (1st Cir. 1990); *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). IIRIRA's permanent rules repeal § 212(c) entirely, replacing it with a new discretionary relief provision, *see* IIRIRA § 304(a) (adding INA § 240A, *codified at* 8 U.S.C. § 1229b (authorizing the INS to "cancel" removal in certain circumstances, but not when an alien has been convicted of an "aggravated felony")).

INA § 212(c) would violate the presumption against retroactivity in statutory interpretation because his convictions pre-dated the enactment of AEDPA and IIRIRA. In the alternative, Mahadeo asserted that retroactive application of IIRIRA's repeal of § 212(c) relief would be unconstitutional. The BIA rejected Mahadeo's arguments.

Mahadeo then petitioned the district court for habeas corpus relief pursuant to 28 U.S.C. § 2241, contending that the BIA erred in concluding that it lacked the authority to consider his request for discretionary relief pursuant to former INA § 212(c). He reiterated both his constitutional arguments and his statutory interpretation challenge premised on the presumption against retroactivity. The district court did not address the merits of Mahadeo's petition because it concluded that IIRIRA's permanent rules revoked the subject matter jurisdiction of federal district courts to entertain § 2241 petitions brought by aliens seeking review of immigration proceedings. Mahadeo now appeals.

II.

Although the parties agree that IIRIRA's permanent rules govern Mahadeo's removal proceedings, we think it is useful for the analysis that follows to explain why that is so. Congress enacted AEPDA in April 1996. Among other things, AEDPA expanded the category of criminal convictions that would render an alien ineligible to apply for § 212(c) discretionary relief.[3] Signifi-

[3] AEDPA § 440 replaced the prohibition on discretionary relief for aliens "convicted of one or more aggravated felonies," with a prohibition on such relief for aliens "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)

cantly, for criminal aliens like Mahadeo, AEDPA § 440(d) made all "aggravated felons" ineligible for relief, even if the alien had not been required to serve a "term of imprisonment of at least 5 years." *Compare* INA § 212(c) (1995) (pre-AEDPA) *with* INA § 212(c), 8 U.S.C. § 1182(c) (1997) (post-AEDPA). Just a few months after Congress enacted AEDPA, it enacted IIRIRA, altering the immigration laws yet again. IIRIRA's permanent rules repealed former INA § 212(c) and created a new form of discretionary relief, "cancellation of removal." *See* IIRIRA § 304 (adding new INA § 240A, *codified* at 8 U.S.C.A. § 1229b (West Supp. 1998)). "Cancellation," like § 212(c) relief both before and after AEDPA's amendments, is not available to aliens whose criminal convictions qualify as "aggravated felonies." *See* IIRIRA § 304(a). Like the AEDPA amendments, the "cancellation" provision continues to make all aggravated felons ineligible for discretionary relief, irrespective of whether the alien was required to serve five years in prison.[4] Having been convicted of an aggravated felony, Mahadeo is ineligible for cancellation of removal.

[aggravated felony], (B) [controlled substance], (C) [certain firearm offenses], or (D) [miscellaneous national security or defense crimes], or any offense covered by section 241(a)(2)(A)(ii) [multiple criminal convictions] for which both predicate offenses are covered by section 241(a)(2)(A)(i) [crimes of moral turpitide]." In *Almon* v. *Reno*, 192 F.3d 28, 30-31 (1st Cir. 1999), we concluded that § 440(d)'s limitation on access to discretionary relief for "deportable," but not "excludable," aliens did not violate equal protection.

[4] In addition, both AEDPA and IIRIRA expanded the definition of "aggravated felony" to encompass more crimes. *See* AEDPA § 440(e); IIRIRA § 321.

IIRIRA provided for a phase-in period during which deportation proceedings would be governed by transition rules. *See* IIRIRA § 309(c)(4). The transition rules treat aliens as subject to the judicial review provisions contained in former INA § 106, 8 U.S.C. § 1105a (1994), as modified by AEDPA, but not as further modified by IIRIRA except for certain transitional changes, *see* IIRIRA §§ 309(a), 309(c)(1), 309(c)(4); *see also Wallace*, 194 F.3d at 283; *Prado* v. *Reno*, 198 F.3d 286, 288 n.2 (1st Cir. 1999). One IIRIRA rule included in the transition regime was new INA § 242(g), *see* IIRIRA § 306(c), which strips courts of jurisdiction to review certain immigration actions except as provided in INA § 242, 8 U.S.C. § 1252. *See Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999). Significantly for the jurisdictional issue in this case, IIRIRA's permanent rules add to INA § 242(g) several new jurisdiction-stripping provisions. *See* INA § 242(a)(1) (providing that "review of a final order of removal . . . is governed only by [the Administrative Procedures Act ("APA")]"); INA § 242(b)(9) (consolidating judicial review of immigration decisions in INA § 242); INA § 242(a)(2)(C) (limiting the availability of judicial review for aliens ordered removed for specified categories of criminal convictions).

IIRIRA's transition rules apply to deportation proceedings commenced before April 1, 1997; proceedings commenced on or after that date are governed by IIRIRA's permanent rules. *See Prado*, 198 F.3d at 288 n. 2; IIRIRA § 309(a). Although Mahadeo's convictions occurred in 1984 and 1996 [*sic*: 1991], prior to the enactment of AEDPA and IIRIRA, the INS did not commence removal proceedings against him until May

30, 1997. Consequently, IIRIRA's permanent rules govern his removal proceeding.

III.

In *Goncalves* v. *Reno*, we held that, although AEDPA and IIRIRA's transition rules "divested the United States Courts of Appeals of their former *statutory jurisdiction*" to hear claims brought by aliens seeking discretionary relief from deportation, "Congress neither explicitly nor by implication repealed the grant of jurisdiction in 28 U.S.C. § 2241 to issue writs of *habeas corpus* to persons in federal custody which the federal district courts have had since 1789 and which has always been available in immigration cases." 144 F.3d at 113 (emphasis added).[5] After carefully analyzing the provisions of the permanent rules relied upon by the Attorney General, we conclude that our holding in *Goncalves* controls here. As a criminal alien, Mahadeo was precluded by IIRIRA from obtaining judicial review in the court of appeals of the BIA's determination that he was ineligible for a discretionary waiver pursuant to former INA § 212(c). *See* INA § 242(a)(2)(C). Mahadeo's only avenue for relief, therefore, was to petition for a writ of habeas corpus. Although the jurisdiction-stripping provisions in the permanent rules are more numerous than those con-

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[5] Since we decided *Goncalves*, nine other circuits have agreed that IIRIRA's transition rules do not repeal access to § 2241 habeas relief for aliens seeking review of legal or constitutional questions raised by immigration proceedings. *See Wallace*, 194 F.3d at 285 n.6 (collecting cases from the Second, Third, Fifth, Sixth, Eight, Tenth, and Eleventh Circuits); *Magana-Pizano* v. *INS*, 200 F.3d 603 (9th Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483 (4th Cir. 1999). *But see La Guerre* v. *Reno*, 164 F.3d 1035 (7th Cir. 1998).

tained in the transition rules, IIRIRA's permanent rules—like the transition rules—lack the kind of explicit language Congress must use if it wants to repeal the availability of § 2241.[6]

A. Availability of Review Under INA § 242

The Attorney General argues that Mahadeo's sole avenue for review of his statutory and constitutional challenges to the BIA decision is new INA § 242, the judicial review provisions enacted as part of IIRIRA's permanent rules. For criminal aliens like Mahadeo, however, judicial review by the courts of appeal pursuant to INA § 242 is unavailable. INA § 242(a)(2)(C), enacted as part of IIRIRA's permanent rules, provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii) [aggravated felony] of this title . . . .

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[6] Because Mahadeo's petition asserts purely statutory interpretation and constitutional questions, it falls squarely within [the] ambit of § 2241's jurisdictional grant. As the plain language makes clear, § 2241 "contemplates challenges based on the 'Constitution or laws or treaties of the United States.'" *See Goncalves*, 144 F.3d at 123-24 (quoting 28 U.S.C. § 2241(c)(3)); *see also Wallace*, 194 F.3d at 284 (observing that § 2241 provides "a general grant of authority to issue habeas writs for persons held in violation of the Constitution or laws, unless such jurisdiction has been limited or withdrawn by Congress"). Although *Goncalves* left for future cases "the task of defining the precise limit of the jurisdiction under 28 U.S.C. § 2241 in immigration cases," we held that the scope of § 2241 review extends to both constitutional and statutory interpretation questions. *Id.* at 125.

We found similar provisions included in AEDPA[7] and IIRIRA's transition rules[8] to preclude access to appellate review for criminal aliens. *See Goncalves*, 144 F.3d at 117 (construing IIRIRA transition rule § 309(c)(4)(G)); *Kolster* v. *INS*, 101 F.3d 785, 786 (1st Cir. 1996) (construing AEDPA § 440(a)). A plain reading of § 242(a)(2)(C) suggests the same result. The phrase, "no court shall have jurisdiction to review," is functionally indistinguishable from "shall not be subject to review by any court," the language in AEDPA § 440(a) that we previously found to preclude direct appeal to the circuit courts, *see Kolster*, 101 F.3d at 786, and not unlike, "no appeal permitted," the language in § 309(c)(4)(G) of IIRIRA's transition rules that we also found preclusive, *see Goncalves*, 144 F.3d at 117-118. Because IIRIRA's permanent rules prevent Mahadeo

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[7] Section 440(a) of AEDPA provides:

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows: "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

[8] IIRIRA § 309(c)(4)(G) provides:

[N]otwithstanding any provision of section 106 of the Immigration an [*sic*] Nationality Act . . . to the contrary—

* * *

There shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in . . . section 241(a)(2)(A)(iii) [aggravated felony] . . . of the Immigration and Nationality Act [as codified at 8 U.S.C. § 1227(a)(2)(A)(iii)] . . . .

from bringing a direct appeal to this court, therefore, his only remaining alternative is to file for a writ of habeas corpus in the district court.[9]

The Attorney General responds that, notwithstanding § 242(a)(2)(C)'s jurisdictional bar, several types of judicial review remain available to Mahadeo. According to the Attorney General, "[t]he court of appeals can review the petition of a criminal alien subject to § 242(a)(2)(C) who raises a substantial constitutional claim." She also urges that "the Court has jurisdiction to determine its own jurisdiction"—that is, "a court of appeals has jurisdiction to determine (i) if the petitioner is an alien, (ii) if he is removable; and (iii) if he is removable because of a conviction for a qualifying crime." She clarifies, however, that "[o]nce the Court has determined that a petitioner is an alien who has been ordered removed for a qualifying criminal conviction[,] it lacks jurisdiction to review any other challenge that the petitioner might raise to his removal proceedings."

The Attorney General's position is similar to the position she took in *Goncalves*. There, she suggested that this court could review substantial constitutional claims and determine whether the alien had, in fact, been convicted of the type of crime that invokes the statutory bar to judicial review. *See Goncalves*, 144 F.3d at 118-119. Because we concluded that Congress

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[9] In *Goncalves*, the Attorney General claimed that notwithstanding the plain language of INA § 242(a)(2)(C), judicial review by the court of appeals was required by INA § 242(g). *See* 144 F.3d at 117-18. We rejected the notion there that § 242(g) provides an affirmative grant of jurisdiction for the courts of appeals to hear appeals of criminal aliens that are otherwise precluded. *See id.*

had not repealed access to habeas relief under § 2241, we took no position on whether or to what extent the Constitution might require IIRIRA to preserve jurisdiction over some types of questions absent the ability to raise such questions in a habeas petition. *See id.* at 118 n.8. We did observe, however, that "IIRIRA itself makes no provisions for . . . review as to [criminal] aliens." *Id.* at 119. Other courts are divided on whether and to what extent to read IIRIRA's jurisdictional bar on judicial review as containing inherent exceptions for certain types of claims. *Compare Liang* v. *INS*, 206 F.3d 308, 322 (3d Cir. 2000) (declining to find exceptions); *with Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135 (9th Cir. 2000) (concluding that § 242(a)(2)(C) permits review over only the narrow question of whether the alien is removable by reason of having been convicted of one of the enumerated offenses); *and with Richardson* v. *Reno*, 180 F.3d 1311, 1316 n.5 (11th Cir. 1999) (construing § 242(a)(2)(C) as allowing judicial review over not only the statutory predicates to removal, but also statutory interpretation and constitutional questions).

We agree that § 242(a)(2)(C) would not preclude us from reviewing that provision's applicability to Mahadeo—i.e., whether Mahadeo is an alien, removable, and removable because of a conviction for a qualifying crime. *See Fierro* v. *Reno*, 217 F.3d 1, 3 (1st Cir. 2000) ("This court's authority to review removal orders based on an aliens's commission of an aggravated felony has recently been restricted, 8 U.S.C. § 1252(a)(2)(C) . . . , but this does not bar Fierro's claim on review that he is a citizen rather than an alien. . . ."); *see also Maghsoudi* v. *INS*, 181 F.3d 8, 13 (1st Cir. 1999) (asserting jurisdiction to determine whether

alien's criminal convictions precluded review of his immigration proceedings under IIRIRA transition rule § 309(c)(4)(G)). The availability of review on these limited threshold issues is of little moment to Mahadeo, however, because the crux of his petition is a challenge to the BIA's interpretation of IIRIRA as precluding discretionary relief, not a challenge to the applicability of § 242(a)(2)(C).

We need not address many of the other issues that the parties attempt to raise because we conclude that habeas jurisdiction remains available to Mahadeo, in conformity with our preference stated in *Goncalves* for grounding jurisdiction "directly on [the] statutory authority" found in § 2241. *See Goncalves*, 144 F.3d at 119. Our conclusion that IIRIRA does not repeal the availability of § 2241 relief in immigration cases also avoids the "serious, novel, and complex" constitutional concerns raised by the elimination of aliens' historic access to general federal habeas corpus jurisdiction when no other judicial review remains.[10] *See Henderson* v. *INS*, 157 F.3d 106, 119 (2d Cir. 1998); *Goncalves*, 144 F.3d at 122; *see also Kolster*, 101 F.3d at 786 (emphasizing that AEDPA's restrictions on judicial review "do[ ] not offend the Constitution," because "at least the habeas corpus review provided by the Constitution remains available to aliens"). *But see Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (holding that IIRIRA limits habeas review and that such limitations are constitutional). As we demon-

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[10] We gratefully acknowledge briefing from amicus curiae, professors from a number of law schools, on the constitutionality of construing IIRIRA to repeal the availability of § 2241 habeas jurisdiction for aliens petitioning for review of statutory and constitutional challenges to their removal proceedings.

strate below, we are able to avoid these serious constitutional concerns because we conclude that IIRIRA's permanent rules lack the clear statement of the congressional intent necessary to eliminate habeas review. *Cf. Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) (court must adopt reasonable interpretation of statute when necessary to avoid serious constitutional problems).

B. Congress's Intent to Repeal Habeas Jurisdiction

Relying on the Supreme Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1869), we held in *Goncalves* that "any repeal of the federal courts' historic habeas jurisdiction . . . must be explicit and make express reference specifically to the statute granting jurisdiction." 144 F.3d at 120. That is, we will not conclude that Congress intended to repeal the availability of § 2241 "merely by implication." *Id.* at 119. Our task in the instant case, therefore, is to discern whether Congress has legislated in IIRIRA with the explicitness necessary to divest the federal courts of § 2241 habeas jurisdiction.

The Attorney General relies upon several specific provisions in INA § 242. She insists that these provisions individually, and viewed in their "entirety," make clear Congress's intent that, under IIRIRA's permanent rules, judicial review for aliens like Mahadeo is available, if at all, only pursuant to INA § 242.

First, the Attorney General directs our attention to § 242(g), a provision that was effective under IIRIRA's transition rules, and which we determined previously

did not repeal the availability of habeas jurisdiction. *See Goncalves*, 144 F.3d at 122.[11] Section 242(g) provides:

> EXCLUSIVE JURISDICTION. Except as provided in this section [INA § 242] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Although we characterized the "notwithstanding" clause as "sweeping," we concluded that it does not contain an express intent to repeal the availability of § 2241. *See Goncalves*, 144 F.3d at 122. We find no warrant for a different conclusion now. As we noted in *Goncalves*, to read § 242(g) as prohibiting all review of immigration cases except as available under § 242 would lead to the "enormous consequence[]" of precluding review under the judicial review provisions contained in old INA § 106, a result that would "clearly conflict" with Congress's intent to preserve review in the transition period under old INA § 106. *See id.* (noting that without access to old INA § 106, aliens whose proceedings were governed by IIRIRA's transi-

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[11] Although the scope of § 242(g) was narrowed by a subsequent Supreme Court decision, *see Reno* v. *American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999) (holding that by its own terms § 242(g) applied only to "three discrete actions"—a decision or action to (i) commence proceedings, (ii) adjudicate cases, or (iii) execute removal orders), we had assumed in *Goncalves* that it governed judicial review of the claim asserted in that case.

tion rules would be entirely without access to judicial review since the judicial review prescribed by INA § 242 only took effect with IIRIRA's permanent rules). If § 242(g)'s "sweeping" language does not repeal judicial review under old INA § 106, it is difficult to see how it repeals the availability of "so significant a provision as the general habeas statute." *Flores-Miramontes*, 212 F.3d at 1138.

Second, the Attorney General draws our attention to INA § 242(a)(1), which provides that "[j]udicial review of a final order of removal . . . is governed only by [the APA]." The APA, in turn, vests courts of appeals with "exclusive jurisdiction" to review certain agency orders. *See* 28 U.S.C. §§ 2341-2351. She also points to INA § 242(b)(9):

> Judicial review of all questions of law or fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

She urges that these provisions read in conjunction channel "judicial review" of all questions relating to immigration proceedings into the APA. Neither § 242(a)(1) nor § 242(b)(9), however, contains an express reference to § 2241. Indeed, both provisions speak only of "judicial review." "'Judicial review' and 'habeas corpus' have important and distinct technical meanings in the immigration context." *Flores-Miramontes*, 212 F.3d at 1140 (citing *Sandoval* v. *Reno*, 166 F.3d 225, 235 (3d Cir. 1999)). "[I]n the immigration context, the Court has historically drawn a sharp distinction be-

tween 'judicial review'—meaning APA review—and the courts' power to entertain petitions for writs of habeas corpus." *Sandoval*, 166 F.3d at 235; *see also Heikkila* v. *Barber*, 345 U.S. 229, 235, 73 S. Ct. 603, 97 L.Ed. 972 (1953) (noting that a statute that eliminated judicial review over immigration proceedings to the maximum extent permissible under the Constitution did not eliminate habeas corpus); *Liang*, 206 F.3d at 320; *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1146 (10th Cir. 1999). We read "judicial review" to mean access to review under the APA, rather than access to a petition for habeas corpus pursuant to 28 U.S.C. § 2241.

The Attorney General contends that in *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999), the Supreme Court construed INA § 242—and especially § 242(b)(9) —to require that all review of immigration proceedings be channeled through § 242 and the APA, precluding habeas relief. In *American-Arab*, the Court held that INA § 242(g) deprived the federal courts of subject matter jurisdiction to entertain a direct appeal brought by an alien claiming that he had been selectively chosen for deportation in violation of the Constitution. *See id.* at 482-83, 119 S. Ct. 936. Although the principal focus was on § 242(g), the Court also stated that § 242(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [decisions and actions.]" *See id.* Relying on *American-Arab*, the district court ruled that it was "compelled" to dismiss Mahadeo's habeas petition for lack of jurisdiction because, to the extent he sought to declare the removal order contrary to the law, his claim was barred by the INA's "zipper clause," § 242(b)(9). *See Mahadeo* v. *Reno*, 52 F. Supp. 2d 203, 204 (D. Mass. 1999).

Both the district court and the Attorney General read *American-Arab* too broadly. As we stated recently: "nothing in *American-Arab* directly precludes deportees governed by the IIRIRA's transition rules from challenging their final deportation orders through habeas where they have no other way to assert in court that their deportation is contrary to the Constitution or laws of the United States." *Wallace* v. *Reno*, 194 F.3d 279, 286 (1st Cir. 1999). Our reason for declining to find that *American-Arab* disturbed habeas jurisdiction was simple: *American-Arab* "was concerned with a different issue"—namely, whether the court had the subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to hear the case on direct appeal. *Wallace*, 194 F.3d at 283. Nothing in *American-Arab*, therefore, alters the rule announced in *Felker* and followed in *Goncalves* that repeal of § 2241 habeas jurisdiction can be achieved only by an express reference to that statute. *See id.*[12]

Our conclusion that § 242(b)(9) does not affect jurisdiction under § 2241 is consistent with the Supreme Court's description of § 242(b)(9) as a "zipper clause." Section 242(b)(9) is entitled "Consolidation of questions for judicial review." It is a "zipper clause" in the sense that it consolidates or "zips" "judicial review" of immigration proceedings into one action in the court of appeals. *See Flores-Miramontes*, 212 F.3d at 1140 (clarifying that § 242(b)(9), some direct appeals from

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[12] Indeed, *American-Arab* noted that the habeas issue was before the circuit courts and, a few days after issuing *American-Arab*, the Supreme Court denied certiorari in *Goncalves*, *see Reno* v. *Pereira Goncalves*, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (1999), and the Second Circuit's decision in *Henderson*, *see Navas* v. *Reno*, 526 U.S. 1004, 119 S. Ct. 1141, 143 L.Ed.2d 209 (1999).

immigration proceedings were in the courts of appeals, while others were in the district courts). Section 242(b)(9) applies only "with respect to review of an order of removal under subsection (a)(1)," and review under subsection (a)(1), in turn, occurs only under "chapter 158 of Title 28, [the APA]." *Id.* Although the APA governs judicial review of certain agency actions, it does not govern habeas proceedings brought under § 2241. *See id.* It follows that § 242(b)(9) "does not apply to actions brought in habeas corpus, and certainly does not serve to repeal in whole or in part the general habeas statute." *Id. But see Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (holding that "the 'unmistakable zipper clause' of INA § 242(b)(9), along with the overall revisions to the judicial review scheme enacted by INA § 242 *et seq.*, constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders").

Third, the Attorney General also contends that the aforementioned bar on judicial review for criminal aliens, § 242(a)(2)(C), repeals habeas jurisdiction—and indeed all judicial review for criminal aliens like Mahadeo (except for the narrow categories discussed above). We disagree.

Section 242(a)(2)(C) provides that:

> [n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in . . . 1227(a)(2)(A)(iii) [aggravated felony] of this title.

This provision is similar to its predecessor under IIRIRA's transition rules, which stated:

> [n]otwithstanding any provision of section 106 of the Immigration and Nationality Act . . . to the contrary—
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> * * *
>
> there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed [certain] criminal offense[s] . . . .

IIRIRA § 309(c)(4). Neither § 309(c)(4) nor § 242(a)(2)(C) contain an express reference to § 2241. In *Goncalves*, we found the phrase, "shall be no appeal permitted," indistinguishable from the limiting language in AEDPA, "shall not be appealable," which the Supreme Court held in *Felker* to lack the explicitness necessary to repeal habeas jurisdiction. *See* 144 F.3d at 120-21.[13] We concluded, therefore, that § 309(c)(4) merely restricts one avenue of relief—an appeal under the APA—but does not abrogate habeas jurisdiction. *See id.* We fail to see how INA § 242(a)(2)(C)'s limitation, "no court shall have jurisdiction to review," is significantly more explicit with respect to the elimination of habeas relief than the analogous bar on judicial review for criminal aliens in IIRIRA § 309(c)(4). The prohibition contained in § 242(a)(2)(C) on "review" of "any final order" is, in one sense, not even as broad as the prohibition in § 242(g) on "jurisdiction to hear any

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[13] The AEDPA provision addressed in *Felker* provided that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable." AEDPA § 106(b), *codified at* 28 U.S.C. § 2244(b)(3)(E).

cause or claim" that we previously held to be inadequate to repeal habeas jurisdiction. *See Goncalves*, 144 F.3d at 122; *see also Flores-Miramontes*, 212 F.3d at 1137. *But see Max-George* v. *Reno*, 205 F.3d 194, 199 (5th Cir. 2000) (holding that § 242(a)(2)(C) eliminates § 2241 habeas jurisdiction for those cases that fall within its scope).

Finally, the Attorney General attempts to distinguish this case from *Goncalves* by insisting that § 242, viewed in its entirety, conveys an intent to make its provisions the exclusive avenue for judicial review of immigration proceedings. That reasoning, however, would turn *Felker* on its head by "requir[ing] a specific reference to § 2241 to preserve such jurisdiction, rather than a specific reference to abolish it." *Goncalves*, 144 F.3d at 122. In *Goncalves*, we explicitly declined the Attorney General's invitation to find that in applying the APA to immigration decisions, Congress intended to create an exclusive forum for immigration appeals, thereby eliminating habeas jurisdiction. *See id.* (explaining that former INA § 106 made immigration decisions appealable under the APA). We emphasized that to infer an intent to repeal the availability of § 2241 from "Congress' decision to make available another avenue for judicial review" was "precisely what *Felker* and *Ex parte Yerger* do not permit." *Id.* at 120. The existence of "another available avenue for judicial review" is simply insufficient to communicate an intent to repeal habeas jurisdiction. *See id.* at 120.

Most decisively, none of the provisions relied upon by the Attorney General contain the kind of "express reference" to § 2241 habeas jurisdiction required by *Goncalves* and *Felker*. Absent explicit language repeal-

ing the availability of § 2241, we are not at liberty to reach a result different than *Goncalves*. It is axiomatic that a panel of this court cannot overrule a prior panel, *see Wallace*, 194 F.3d at 283. Moreover, Congress has shown in enacting IIRIRA that it knows how to use explicit language when it intends to place limitations on judicial review under particular statutes. *See Goncalves*, 144 F.3d at 121 ("IIRIRA contains numerous provisions restricting or altering various avenues for judicial review, but in none of these provisions does IIRIRA mention § 2241."). For example, IIRIRA § 306, which enacts new INA § 242, contains provisions that refer specifically to the judicial review provision of the APA and the Declaratory Judgment Act. *See id.* Yet, IIRIRA's permanent rules do not mention habeas corpus jurisdiction under § 2241. The lack of any express reference to § 2241 is particularly revealing because the Supreme Court decided *Felker* just three months before IIRIRA was enacted, placing Congress on notice that any repeal of § 2241 jurisdiction requires an express reference to that statute.

To be sure, the permanent rules do not *affirmatively authorize* habeas review under § 2241. But an affirmative authorization has never been deemed necessary. Even when limited habeas review was available pursuant to old INA § 106(a)(10), it was well-recognized that this alternative basis for seeking a writ of habeas corpus did not "supplant[ ] the general federal habeas statute." *Flores-Miramontes*, 212 F.3d at 1138-39 (citing *Foti* v. *INS*, 375 U.S. 217, 231, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963)); *see Goncalves*, 144 F.3d at 121 (noting that in AEDPA § 401(e), Congress expressly repealed former INA § 106(a)(10)'s authorization that "any alien held in custody pursuant to an order of de-

portation may obtain judicial review thereof by habeas corpus proceedings"). Although § 2241 and § 106(a)(10) were independent bases for habeas review, Congress repealed only § 106(a)(10), creating the basis for an inference that Congress intended § 2241 to remain available.[14]

In short, IIRIRA's permanent rules—like the transitional rules before them—lack a clear statement of intent to repeal § 2241 jurisdiction. The district court, therefore, erred in dismissing Mahadeo's habeas corpus petition for want of subject matter jurisdiction.

IV.

In his habeas petition, Mahadeo asserts his right to apply to the BIA for a discretionary waiver of the removal order pursuant to the pre-AEDPA version of INA § 212(c). In particular, he asserts that the presumption against retroactivity in statutory interpretation requires IIRIRA to be construed as preserving the availability of pre-AEDPA INA § 212(c) relief for aliens whose criminal convictions pre-dated the enactment of AEDPA and IIRIRA. Alternatively, he asserts that denying him access to relief under pre-AEDPA INA § 212(c) would be unconstitutional. The district court did not reach these issues because it concluded that it lacked jurisdiction to entertain the habeas petition.

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[14] Because jurisdiction under § 2241 for aliens does not depend on any statutory provision of the INA, we do not read IIRIRA's express authorization of certain limited habeas corpus review for determinations made under INA § 235(b)(1) (dealing with screening aliens for admission and claims for asylum) as evidence of an intent to repeal the availability of § 2241.

On appeal, Mahadeo argued in his initial brief only constitutional grounds for his entitlement to the availability of section 212(c) relief. Not surprisingly, the Attorney General responded in her brief only to these constitutional claims. In his reply brief, however, Mahadeo took a different approach, stating that his principal claim to the continuing availability of section 212(c) relief is "a statutory retroactivity challenge—that the repeal of section 212(c) does not apply to cases where, as here, the criminal conduct and conviction (by plea) occurred before passage of the 1996 amendments." Not surprisingly, the government insisted at oral argument that this statutory retroactivity challenge cannot be raised for the first time in a reply brief.

We agree. So, apparently, does Mahadeo, who focuses in his reply brief on the availability of § 2241 jurisdiction in the district court and asks for the opportunity to develop there his statutory and constitutional arguments about the continuing availability of § 212(c) relief. Specifically, he requests the following:

> If this court concludes that the district court had habeas jurisdiction to review Mr. Mahadeo's statutory and constitutional claims, Mr. Mahadeo respectfully requests that the court remand his case to allow him to develop those claims in the district court in the first instance and to brief them fully in light of this court's intervening retroactivity decision in *Mattis* v. *Reno*, 2000 WL 554957 (1st Cir. May 8, 2000)

In the peculiar circumstances of this case, this approach makes sense. Given the district court's decision to dismiss Mahadeo's habeas petition for lack of subject matter jurisdiction, it never addressed his claim

on the merits about the continuing availability of section 212(c) relief. We have concluded that this opinion was wrong, and that the district court should have addressed the statutory and constitutional claims raised in Mahadeo's petition. We now remand for that purpose.

Judgment vacated. Remanded to the district court for further proceedings consistent with this decision.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 99-10716 RGS

SOONDAR MAHADEO

v.

JANET RENO, ATTORNEY GENERAL;
DORIS MEISSNER, COMMISSIONER OF THE
IMMIGRATION AND NATURALIZATION SERVICE;
DEPARTMENT OF JUSTICE; AND
STEVEN FARQUHARSON, DISTRICT DIRECTOR

MEMORANDUM AND ORDER ON PETITIONER'S MOTION FOR A STAY OF REMOVAL AND PETITION FOR WRIT OF HABEAS CORPUS

May 18, 1999

STEARNS, District Judge.

Soondar Mahadeo is a native and citizen of Trinidad and Tobago who immigrated lawfully to the United States in 1975. In 1984, and again in 1991, Mahadeo was convicted of possessing a controlled substance with the intent to distribute. These are "aggravated felonies," which under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), render

Mahadeo ineligible for discretionary relief (now called Cancellation of Removal). See 8 U.S.C. §§ 1229b(a)(3); 1101(a)(43)(B).

Removal proceedings were commenced against Mahadeo by the Immigration and Naturalization Service (INS) on May 30, 1997. See 8 U.S.C. § 1227(a)(2)(B)(i). Mahadeo's request to apply for discretionary relief from deportation pursuant to section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c), was denied by the Immigration Judge because §§ 304(b) and 309(a) of the IIRIRA eliminated section 212(c) relief for persons placed in removal proceedings on or after April 1, 1997.[1] The Board of Immigration Appeals (BIA) affirmed the decision of the Immigration Judge on February 10, 1999, rejecting Mahadeo's arguments that the IIRIRA was unconstitutional as written and applied.

Mahadeo's petition renews these arguments with some additional elaboration. In Count I of the petition, Mahadeo maintains that the Attorney General's decision to bring removal proceedings under the new law, rather than deportation proceedings under prior law, denied him the opportunity to apply for section 212(c) relief in violation of his rights to due process and equal protection. In Count II, Mahadeo contends that the IIRIRA is generally unconstitutional and contrary to the Administrative Procedures Act. Count III challenges the constitutionality of the retroactive application of the repeal of discretionary relief to events (convictions) that occurred prior to the IIRIRA's enact-

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[1] Because it is undisputed that Mahadeo was placed in removal proceedings after that date, the holding of *Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), does not apply to his case.

ment. Count IV challenges the provisions of the IIRIRA classifying his convictions as aggravated felonies as inconsistent with the intent of Congress and as a violation of "the presumption against retroactivity." Finally, Count V attacks these same provisions as violating due process, equal protection, and the prohibition against ex post facto laws.

On April 13, 1999, the court granted petitioner's motion for a stay of removal, but expressed doubt as to the merits of petitioner's constitutional claims. The court consequently invited petitioner to submit within ten days "a memorandum more fully developing the underlying arguments." The court also ordered the Commissioner to respond to the underlying petition. The Commissioner complied by filing a motion to dismiss for want of subject matter jurisdiction with an accompanying memorandum of law. The petitioner submitted no further pleadings.

While one might suppose that Mahadeo's arguments are weak, if only from the fact that he has chosen to rely solely on the conclusory assertions of his petition, I am compelled by the Supreme Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, —— U.S. ——, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999), to conclude that the IIRIRA has divested the district court of jurisdiction to rule on their merits. In *Reno*, the Court focused on the interaction of two provisions of the IIRIRA, §§ 1252(b)(9)[2] and 1252(g),[3]

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[2] "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter

holding that § 1252(g) applies "to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal order[s],'" 525 U.S. at ——, 119 S. Ct. at 943, thereby insulating these actions from judicial review.

As the government states in its brief:

> Because the instant petition seeks "a stay of the order to remove petitioner pending the resolution of this matter," . . . and "a stay of deportation pending the resolution of this petition", . . . he seeks to enjoin the "execution of [a] removal order[ ]", and thus section 1252(g) operates to divest the Court of jurisdiction to stay deportation. Because petitioner also seeks review of his removal order to "[d]eclare Mr. Mahadeo's order of deportation/removal as contrary law," . . . review in [the] district court is barred by "the unmistakable 'zipper clause'" of 8 U.S.C. § 1252(b)(9) that channels all available review through the circuit court.

Government's Opposition, at 2-3.

The question remaining is whether despite the IIRIRA, this court might retain residual jurisdiction to hear petitioner's case under 28 U.S.C. § 2241. This

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shall be available only in judicial review of a final order under this section."

[3] "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

issue was confronted recently by Judge Keeton in *Fontes* v. *Reno*, C.A. 99-10491-REK (D. Mass., March 9, 1999) a case factually similar to this one. I adopt Judge Keeton's determination that *Reno* answers the question "no."

> I conclude, through recognizing the issue as a close and reasonably debatable one, that I must now be guided by the principle that 28 U.S.C. § 2241, like the statutory provision before the Court in *Reno*, contains no explicit authorization of jurisdiction in this court over the present petition and that the limitations on jurisdiction under § 2241 that are stated in its text are not to be interpreted as an implicit grant of jurisdiction over petitions that do not fall within the scope of those limitations.

Fontes, at 8-9.

ORDER

For the foregoing reasons, the petition for writ of habeas corpus is DISMISSED for want of subject matter jurisdiction. I will continue the stay of removal for a period of three weeks, unless sooner terminated by an order of this court or extended by an order of the Court of Appeals.

SO ORDERED.

/s/ RICHARD G. STEARNS
RICHARD G. STEARNS
United States District Judge

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A34 362 542 – Boston Date: Feb 10, 1999

In re: SOONDAR MAHADEO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Lenore Glaser, Esquire
[REDACTED]

ON BEHALF OF SERVICE:

Richard D. Neville
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination of proceedings

ORDER:

PER CURIAM. The respondent's appeal is dismissed. The request for oral argument before the Board is denied. *See* 8 C.F.R. § 3.1(e).

On appeal, the respondent extensively argues that his conviction occurred before the enactment of the Anti-Terrorism law and that retroactive application of that law to his conviction is prohibited by law, as enunciated by the United States Court of Appeals for the First Circuit in *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998). The respondent also contends that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should not be applied in his case because his conviction pre-dates the enactment of this Act. He argues that the application of either law to his past conduct would constitute an impermissible retroactive application of a new law pursuant to *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The respondent asserts that at the time of his conviction he was eligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. The respondent further contends that the Immigration Judge's refusal to allow him to apply for a section 212(c) waiver is unconstitutional on equal protection grounds.

The respondent's contentions on appeal regarding section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996) (AEDPA) and the effect of that section on his eligibility for a waiver of inadmissibility under section 212(c) of the Act are not germane to the disposition of this matter. Removal proceedings replaced deportation and exclusion proceedings in immi-

gration cases commencing on or after April 1, 1997. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (enacted Sept. 30, 1996) (IIRIRA). The respondent's case commenced on May 30, 1997, by the filing of a Notice to Appear (Form I-862) with the Immigration Court. *See* Exh. 1. Thus, the provisions of the IRRIRA constitute the relevant statutory authority in the instant proceedings, not AEDPA as claimed by the respondent on appeal. Thus, the respondent's reliance upon the First Circuit's decision in *Goncalves v. Reno*, *supra*, is misplaced as that decision dealt with the issue of the retroactive application of AEDPA to aliens in deportation proceedings. As discussed above, that issue is not relevant to the present case because the respondent is in removal proceedings.

Furthermore, sections 304(b) and 309(a) of the IRRIRA, 110 Stat. 3009-597, 3009-625, specifically repealed section 212(c) of the Immigration and Nationality Act in all cases commencing on or after April 1, 1997.[1] Thus, the respondent's contention that he should have been allowed to apply for discretionary relief by way of a waiver of deportation because a new law is being applied retroactively is incorrect. The provisions of the IIRIRA are not being applied retroactively to the respondent's case merely because facts occurring before the IIRIRA's enactment are relevant to the

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[1] The IIRIRA replaced section 212(c) of the Act with an analogous form of relief for lawful permanent residents—cancellation of removal under section 240A(a) of the Act. The respondent's conviction for an offense defined as an aggravated felony under section 101(a)(43)(B) of the Act, however, renders him statutorily ineligible for this form of relief from removal. *See* section 240A(a)(3) of the Act.

outcome of his removal proceedings. Congressional repeal of a discretionary power to relieve an alien from deportation does not attach any new legal consequences to pre-enactment convictions. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995). In any event, the presumption against retroactivity relied upon by the respondent on appeal does not exist in this case where Congress expressly provided a statute is retroactive. In the present case, sections 304(b) and 309(a) of the IRRIRA, 110 Stat. 3009-597, 3009-625, expressly eliminated section 212(c) of the Act in proceedings commencing on or after April 1, 1997. Moreover, section 309(a) of the IRRIRA expressly provides that the amendments to the Act made by Title III-A of the IRRIRA shall be effective in all proceedings commencing after April 1, 1997.

The respondent's general constitutional arguments are also without merit. The Board does not have the authority to rule on the constitutionality of the laws which we administer. *See Matter of Collado-Munoz*, Interim Decision 3333 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991) (Board's jurisdiction is defined by regulation and the Board has no jurisdiction unless it is affirmatively granted by the regulations). *See generally* section 103 of the Act (powers and duties of the Attorney General); 8 C.F.R. § 3.1(d) (1998) (subject to any specific limitations prescribed by regulation, the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary). Moreover, the prohibition of ex post facto laws in the Constitution has been held to have no application to deportation of aliens. *See Bugajewitz v. Adams*, 228 U.S. 585 (1913). Legislation,

although retroactive, which does not impair vested rights or violate express constitutional prohibition, is valid. It is thoroughly established that Congress has the power to order the deportation of aliens whose presence in the country is deemed hurtful. *Id.* An alien residing in this country has no vested right to remain. Rather, he is subject to the power of Congress to enact legislation which might prohibit or limit his stay in this country. *See Marcello v. Bonds*, 349 U.S. 302, 314 (1955). Thus, Congress has plenary power to regulate immigration and the respondent has no fundamental constitutional right to pursue a remedy that formerly might have allowed him to remain in the United States where Congress has seen fit to alter the criteria for statutory eligibility for relief and where the respondent does not meet the standards set by Congress.

The respondent's arguments premised on the holding of the United States Court of Appeals for the Second Circuit in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), also fail to establish an equal protection violation. We first note that the respondent does not argue that aliens in removal proceedings are denied equal protection because they cannot apply for a section 212(c) waiver. Rather, he argues that AEDPA's distinction between aliens in exclusion versus deportation proceedings establishes an equal protection violation. *See* Respondent's Second Brief at 25-26. However, the respondent's arguments concerning the effect of the AEDPA on aliens in exclusion or deportation proceedings is irrelevant to his case as he is in neither exclusion nor deportation proceedings. He is in removal proceedings. The appropriate form of relief for lawful permanent residents in removal proceedings is cancellation of removal pursuant to section 240A(a). Cancellation of

removal is equally available to any lawful permanent resident alien in removal proceedings who is otherwise eligible regardless of whether he or she has made a trip outside of the United States. Thus, the respondent's argument regarding statutory distinctions between aliens who do, or do not, take a trip outside of the United States is irrelevant within the statutory scheme governing his case.

Finally, the respondent briefly argues on appeal that the Immigration and Naturalization Service failed to meet its burden of establishing that the conviction records offered by it into evidence relate to him. He contends that the Service did not establish that the Mr. "Mahdeo" listed on the 1984 conviction records is the same person as himself.

We find this argument to be without merit. The respondent's name is "Soondar Mahadeo." The name listed on the 1984 conviction record is "Soondar Mahdeo." The similarity of the name listed to that of the respondent, particularly where the name is unusual, is striking. The omission of one letter from the last name of the defendant listed on the 1984 conviction record appears to be a typographical error. We note that the Commonwealth of Massachusetts, within which jurisdiction the conviction occurred, traditionally uses the spelling of the name of the defendant as it appears on the indictment even when informed that the spelling is in error. *See Commonwealth v. Gunter*, 692 N.E.2d 515, 519 at ftnt 3 (Mass. 1998). In addition, an indictment is not "bad" for having a typographical error. *See Commonwealth v. Desmarteau*, 82 Mass. 1 (1860) (indictment for murder at Chicopee not bad for spelling it "Chickopee").

Moreover, defense counsel is listed as "Hakala" in both the 1984 and 1991 conviction records and the defendant's birth date is listed as August 16, 1956, on the 1984 conviction record (Exh. 5) and as August 15, 1956, on the 1991 conviction record (Exh. 6). The similarities in birth date and the use of the same defense attorney support a finding that the respondent is the person named in the 1984 conviction record. In addition, we note that the respondent repeatedly stated during his hearing that he was attempting to have both the 1984 and 1991 convictions vacated. In light of these facts, we find that the Service met its burden of establishing that the person listed on the 1984 conviction record is the respondent. *See United States v. Paulino*, 13 F.3d 20, 23 (1st Cir. 1994) (a document is authenticated where there is enough support in the record for a reasonable person to determine that the document is what it purports to be).

Inasmuch as the respondent's statements on appeal fail to establish any error in the Immigration Judge's determination that the respondent is removable from the United States as charged, the respondent's appeal is dismissed.

/s/ JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX D

IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203-0002

Case A34-362-542

IN THE MATTER OF SOONDAR MAHADEO, RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Nov. 13, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✿] The respondent was ordered removed from the United States to Trindad-Tobago.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other:

Date: Nov. 13, 1997

Appeal: WAIVED Appeal Due By: 12-15-97

/s/ WILLIAM JOYCE
WILLIAM JOYCE
Immigration Judge

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[2] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to

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[2] Section 1182(c) of Title 8 was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. The version set forth in the text reflects both sets of amendments.

exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 235(b) of the Immigration and Nationality Act, 8 U.S.C. 1225(b) (Supp. IV 1998), provides in pertinent part:

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

* * * * *

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and ques-

tioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

* * * * *

7. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. 1229b(a) (Supp. IV 1998), provides:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel the removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (a) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (b) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (c) has not been convicted of any aggravated felony.

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. IV 1998), provides in pertinent part:

> **§ 1252. Judicial review of orders of removal**
>
> **(a) Applicable provisions**
>
> **(1) General orders of removal**
>
> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not

order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

* * * * *

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to

their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this

subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such

> further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.
>
> * * * * *

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[3] provides in pertinent part:

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[3] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA.

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

> **EFFECTIVE DATES; TRANSITION.**
>
> (a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").
>
> * * * * *
>
> (c) TRANSITION FOR ALIENS IN PROCEEDINGS.—
>
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

* * * * *

13. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]
>
> * * * * *

Supreme Court, U.S.
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No. 00-962

In The

Supreme Court of the United States

JOHN ASHCROFT, Attorney General, et al.,

Petitioners,

v.

SOONDAR MAHADEO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court could exercise habeas corpus jurisdiction under 28 U.S.C. § 2241, to entertain respondent's challenge to his final removal order.

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Soondar Mahadeo, responds to the petition for a writ of certiorari filed by the Solicitor General to review the judgment of the United States Court of Appeals for the First Circuit in this matter.

STATEMENT

1. In his original response to the Solicitor General's petition for a writ of certiorari, Respondent waived his right to file a response. This was done in light of the Court's grant of the Solicitor General's petition for a writ of certiorari in *INS v. St. Cyr*, No. 00-767, which presents issues identical to this matter. Thus, the Court's disposition of *St. Cyr* will also fully dispose of this matter. Thereafter the Court directed the Clerk to request a response from respondent on February 5, 2001.

2. Respondent generally agrees with the Solicitor General's representations of the factual and the legal background expressed in his petition for a writ of certiorari. Respondent also agrees that the Solicitor General's petition for a writ of certiorari in this matter should be held in abeyance pending the Court's disposition of *INS v. St. Cyr*, No. 00-767, because both cases present the identical threshold jurisdictional question.

CONCLUSION

The Solicitor General's petition for a writ of certiorari should be held in abeyance pending the decision by the Court on the merits in *INS v. St. Cyr*, No. 00-767.

Respectfully submitted,

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March 2001